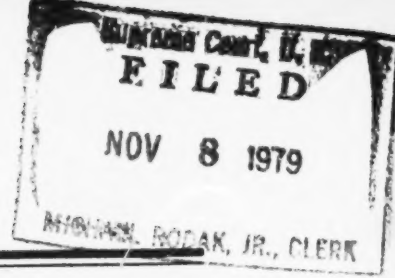


No. 79-321



In the Supreme Court of the United States

OCTOBER TERM, 1979

LACLEDE GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE FEDERAL ENERGY
REGULATORY COMMISSION IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-4) is not yet reported. The opinion and order of the Federal Energy Regulatory Commission (Pet. App. A-14 to A-31) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1979. A petition for rehearing was denied on May 30, 1979 (Pet. App. A-5, A-6). The petition for a writ of certiorari was filed on August 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an order of the Federal Energy Regulatory Commission approving an interstate natural gas pipeline's tariff filing under Order No. 7 of the Administrator of the Emergency Natural Gas Act of 1977 is reviewable exclusively in the Temporary Emergency Court of Appeals.

STATUTES INVOLVED

Sections 3, 4, 6, 10 and 13 of the Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, 91 Stat. 5-10, 15 U.S.C. (Supp. I) 717 note, are set forth at Pet. App. A38-A56; Section 4 of the Natural Gas Act of 1938, 15 U.S.C. 717c, is set forth at Pet. App. A57-A60.

STATEMENT

The Emergency Natural Gas Act of 1977 (ENGA), Pub. L. No. 95-2, 91 Stat. 4, 15 U.S.C. (Supp. I) 717 note, temporarily¹ empowered the President to order the emergency delivery and transportation of natural gas. Under Section 6 the President could authorize any interstate pipeline or local distribution company to contract for emergency supplies of natural gas for delivery before August 1, 1977, from any producer of natural gas, intrastate pipeline or local distribution company. Section 6(b) exempted such contracts from the Natural Gas Act, 15 U.S.C. 717 *et seq.*, and required the Federal Power Commission to permit the pass-through of purchase and transportation costs under ENGA (Pet. App. A48-A50).

¹President Carter declared a natural gas emergency under the terms of the ENGA the day it was enacted, February 2, 1977 (Proc. No. 4485, 42 Fed. Reg. 6789) and declared the emergency terminated on April 1, 1977 (Proc. No. 4495, 42 Fed. Reg. 18053).

Section 13 of ENGA permitted the President to delegate the authority granted to him under ENGA to other officers of the United States. By Executive Order No. 11969, 42 Fed. Reg. 6791 (1977), the President designated the Chairman of the Federal Power Commission as Administrator of the Act. The Administrator issued Order No. 7, 42 Fed. Reg. 22146 (1977), establishing rules for the allocation of charges paid for purchases and deliveries under Section 6 of ENGA. Section 10(b) of ENGA vested "exclusive original jurisdiction to review all civil cases and controversies under [the] Act" in the Temporary Emergency Court of Appeals (Pet. App. A53).

Between February 1977 and July 1977, United Gas Pipeline Company, an interstate pipeline, purchased gas under Section 6 of ENGA from various intrastate pipelines, and delivered that gas to its customers, one of which was another interstate pipeline, Mississippi River Transmission Corporation (MRT). United passed on to MRT the purchase costs it had incurred for the volumes delivered.

On August 31, 1977, MRT, in turn, filed with the Federal Power Commission² in Docket No. RP72-149 (PGA 77-10) tariff sheets passing on those purchase costs to MRT's wholesale customers. One of those customers,

²Pursuant to the provisions of the Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7101 *et seq.*, the Federal Power Commission ceased to exist on September 30, 1977, and most of its functions and regulatory responsibilities, including those relevant to this case, were assumed by the Federal Energy Regulatory Commission effective October 1, 1977. Hereinafter, the term "Commission" refers to the FPC or the FERC depending on whether the events referred to occurred before or after October 1, 1977.

Laclede Gas Company, petitioner here, protested, and by order of September 30, 1977, the Commission suspended the filing and set it for hearing under Section 4 of the Natural Gas Act, 15 U.S.C. 717c (Pet. App. A15-A16).

MRT sought rehearing of the September 30 order on the ground that under Section 6 of ENGA and Order No. 7 thereunder, pass-through of the emergency purchase gas cost was automatic. The Commission agreed that MRT's filing complied with the requirements of Section 6 of ENGA and Order No. 7, and that the Commission was therefore required by Section 6(b)(2) of ENGA to permit the pass-through (Pet. App. A14-A31). Section 6(b)(2) provides:

In exercising its authority under the Natural Gas Act, the Federal Power Commission shall not disallow, in whole or in part, recovery by any interstate pipeline, through the rates and charges made, demanded, or received by such pipeline, the amounts actually paid by it for natural gas purchased, transported or other costs incurred [for emergency purchases authorized by the President under Section 6(a)].

The Commission therefore vacated its order setting the matter for hearing, accepted MRT's tariff, and terminated the proceeding (Pet. App. A14-A31).

Laclede filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b). That court dismissed the petition on the ground that "petitioner's suit arises under the Emergency Natural Gas Act of 1977 * * * and in accordance with §10(b) of the Act, is within the exclusive jurisdiction of the Temporary Emergency Court of Appeals * * *" (Pet. App. A3).

ARGUMENT

The decision of the court of appeals is correct. There is no conflict concerning the relative jurisdictions of the courts of appeals and the Temporary Emergency Court of Appeals with respect to issues arising under the Emergency Natural Gas Act. Moreover, because ENGA was a temporary statute that is no longer effective, the issue is not of current importance. Accordingly, review by this Court is not warranted.

The court of appeals correctly held that this case arises under ENGA. "For purposes of determining TECA jurisdiction, what is determinative is not whether an [ENGA] question exists, but whether an [ENGA] question has been adjudicated." *Texaco, Inc. v. Dept. of Energy, et al*, TECA No. DC-52 (Oct. 15, 1979), slip op. 10; Accord, *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, No. 79-7330 (2d Cir. Aug. 1, 1979), slip op. 4022. Cf. *Bray v. United States*, 423 U.S. 73 (1975). In this case the Commission adjudicated a question under ENGA. It held that MRT's purchases of emergency gas from United were subject to the provisions of ENGA and Order No. 7 of the ENGA Administrator, and that the Commission was therefore required by Section 6 of ENGA to accept the tariff. Even though the filing was in form submitted to the Commission under Section 4 of the Natural Gas Act, the validity of that filing depended solely upon construction of Section 6 of ENGA and the Administrator's Order No. 7 thereunder. The Commission's decision, which we believe correct, was in any event the adjudication of a question under the ENGA, and therefore reviewable only in TECA.

Lo-Vaca Gathering Company v. Railroad Commission of Texas, 565 F. 2d 144 (T.E.C.A. 1977), is not to the contrary. In that case the appellant sought TECA review of an order of a state utility commission that the appellant claimed was in conflict with ENGA but which was not an order based on ENGA and that did not adjudicate any question under ENGA. TECA held that it lacked jurisdiction, explaining that its jurisdiction under ENGA, like its jurisdiction under Section 211 of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, was limited to "review of federal administrative decisions, or action taken under the Act," 565 F. 2d at 147, and did not include jurisdiction to review "an original complaint challenging an order of a state regulatory commission" (*id.* at 148).³ In this case, in contrast, the order of the Commission challenged by petitioner was based on ENGA and it adjudicated a question under ENGA. The Commission acted pursuant to its express obligation under Section 6(b) of ENGA to "not disallow" the

³In *Lo-Vaca*, the court also stated later in its opinion that its jurisdiction was limited to "review of action taken by the Administrator under the [ENGA]" (565 F. 2d at 148), but the court clearly did not intend to exclude actions taken by the Commission under ENGA, which were not involved in that case. The court's reliance on the parallel jurisdictional provision of Section 211 of the Economic Stabilization Act indicates that the court had no such intention, because TECA and other courts have held that the "Power Commission orders which raise Economic Stabilization issues are exclusively reviewable in the District Court, with review in [TECA]." *City of Groton v. FPC*, 487 F. 2d 927, 935 (T.E.C.A. 1973); see also *Municipal Intervenor Group v. FPC*, 473 F. 2d 84, 90 (D.C. Cir. 1972). The only difference between the Economic Stabilization Act and ENGA is that under Section 10(b) of ENGA, "TECA has replaced the district court as the court of first resort." *Lo-Vaca Gathering Company v. Railroad Commission of Texas*, *supra*, 565 F. 2d at 146.

recovery of charges paid for emergency gas purchased authorized by ENGA, and its action was thus a federal administrative decision taken under that Act.

Finally, the issue is not of current significance. The natural gas emergency declared by the President on February 2, 1977, under Section 3 of ENGA (Proc. No. 4485, 42 Fed. Reg. 6789) was terminated on April 1, 1977 (Proc. No. 4495, 42 Fed. Reg. 18053), and authority for emergency gas purchases under Section 6 expired August 1, 1977. Petitioner notes (Pet. 10) that Title III of the Natural Gas Policy Act of 1978 (NGPA), Pub. L. No. 95-621, 92 Stat. 3381-3388, reenacts the substantive provisions of ENGA, and that Section 506(c) of NGPA (92 Stat. 3405) reenacts Section 10(b) of ENGA. This emergency authority, however, is now in stand-by status, and it does not appear likely that the President will be required to declare a natural gas emergency in the near future.⁴

⁴There is no merit to petitioner's further contention that the court of appeals decision rests upon grounds not invoked by the Commission, in contravention of the principle of *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). The Commission plainly based its decision on Section 6 of ENGA and Order No. 7 thereunder (Pet. App. A18-A29). Whether jurisdiction over the review proceeding rested in TECA or the court of appeals presented a judicial question to be decided in the first instance by the court of appeals, not by the Commission. The statement of the Commission's counsel in its brief in the court of appeals that the court had jurisdiction under Section 19(b) of the Natural Gas Act was not a matter that the Commission had decided, and thus *Chenery* requires no remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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